NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

E.A. Sween Co. *and* Teamsters Local Union No. 754, affiliated with the International Brotherhood of Teamsters. Case 13–CA–45563

December 24, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 7, 2009, the General Counsel issued the complaint on October 20, 2009, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 13–RC–21777. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.¹

On November 10, 2009, the General Counsel filed a Motion for Summary Judgment. On November 13, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

Ruling on Motion for Summary Judgment²

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections to the election.³

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate*

¹ The Respondent's answer denies knowledge of the filing and service dates of the charge, but admits the charge was filed and served. A copy of the charge is included in the documents supporting the General Counsel's motion, showing the date of the charge as alleged, and the Respondent does not refute the authenticity of this document.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Narricot Industries, L.P. v. NLRB, F.3d___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), cert. granted ___S.Ct.__ 2009 WL 1468482 (U.S. Nov. 2, 2009); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); Teamsters Local 523 v. _F.3d ___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377)

In its answer, the Respondent specifically denies the allegations in pars. 5(a), (b), (c), and (d), which allege, respectively, that the listed employees constitute an appropriate unit; that the unit employees selected the Union as their exclusive collective-bargaining representative in an election held on Aug. 29, 2008; that the Union was certified on Aug. 17, 2009; and that since Aug. 29, 2008, the Union has been the exclusive collective-bargaining representative of the unit. The General Counsel has attached to his motion copies of the Tally of Ballots, dated Aug. 29, 2008 (GC Exh. 2), and the Decision and Certification of Representative, dated Aug. 17, 2009 (GC Exh. 5). The Respondent does not contest the authenticity of these documents. Accordingly, we find the relevant complaint allegations to be established to be true. Further, the appropriateness of the unit and the Union's status as the collectivebargaining representative of the unit were litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denials with respect to these allegations do not raise any litigable issues in this proceeding. See Alta Vista Regional Hospital, 352 NLRB 809, 809 fn. 3 (2008).

Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Minnesota corporation, with an office and place of business in Woodridge, Illinois, has been engaged in the business of food distribution.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, purchased and received at its Woodridge, Illinois facility goods and materials valued in excess of \$50,000 directly from points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Teamsters Local Union No. 754, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on August 29, 2008, in Case 13–RC–21777, the Union was certified on August 17, 2009, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers employed by Respondent out of its facility currently located at 10350 Argonne Drive, #500, Woodridge, Illinois; but excluding all lead drivers, office clerical employees and guards, professional employees, and supervisors as defined in the Act.

The Union continues to be the exclusive collectivebargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On September 10, 2009, the Union, by Floyd F. Prusinski, requested that the Respondent meet to bargain collectively with it as the exclusive collective-bargaining representative of the unit. By letter dated October 6, 2009, the Respondent declined the Union's request to meet and bargain. We find that this failure and refusal constitutes an unlawful failure to recognize and bargain

with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing, since about October 6, 2009, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, E.A. Sween Co., Woodridge, Illinois, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to recognize and bargain with Teamsters Local Union No. 754, affiliated with the International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers employed by Respondent out of its facility currently located at 10350 Argonne Drive, #500, Woodridge, Illinois; but excluding all lead drivers, office clerical employees and

⁴ Thus, we deny the Respondent's requests that the complaint be dismissed with prejudice and that it be granted judgment for costs and attorneys' fees.

E.A. SWEEN CO.

guards, professional employees, and supervisors as defined in the Act.

- (b) Within 14 days after service by the Region, post at its facility in Woodridge, Illinois, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 6, 2009.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 24, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Teamsters Local Union No. 754, affiliated with the International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time drivers employed by us out of our facility currently located at 10350 Argonne Drive, #500, Woodridge, Illinois; but excluding all lead drivers, office clerical employees and guards, professional employees, and supervisors as defined in the Act.

E.A. SWEEN CO.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"